

1 been presented a claim to pursue, and the Trustee
2 has decided to delegate that. And we should
3 know, as unsecured creditors, what the terms and
4 conditions of the agreement are.

5 You know, it could be that Royal
6 spends millions of dollars in that claim
7 defending, and we have another administrative
8 claim that we have to deal with. There are no
9 checks and balances.

10 There is a complete delegation
11 responsibility. I believe that Royal's counsel
12 said that, to the extent that there's any
13 obligation to seek Court approval, it only
14 applies to Paragraph 2.

15 I would ask Your Honor to consider
16 applying those same provisions to Paragraphs 7
17 and 11, which would then give the creditors a
18 fighting chance of at least knowing what's going
19 on.

20 Thank you, Your Honor.

21 THE COURT: Thank you.

22 Mr. McMichael.

23 MR. McMICHAEL: Your Honor, as a
24 matter of basic litigation strategy, I think it's

1 obvious why we cannot put on the open -- in the
2 open record the amount that we have agreed to
3 with Royal, by which we can give up Royal's
4 claim, knowing that would be a significant
5 litigation disadvantage.

6 And we have those agreement letters
7 here, and I have prepared an envelope to file
8 them under seal, and would request that the Court
9 permit me to file them under seal for the Court's
10 inspection.

11 THE COURT: I will take them, but I
12 don't recall off hand whether there's a
13 requirement that you file a motion under the
14 local rules.

15 THE CLERK: Yes.

16 THE COURT: Give them to me. File
17 your motion tomorrow.

18 MR. McMICHAEL: Yes, sir. These
19 letters would be addenda to Exhibit A to our
20 settlement agreement, and are part of it.

21 And they relate to Paragraph 6 and
22 to Paragraph 8. Let me just point out the effect
23 of them, though. It's less than meets the eye.

24 In Paragraph 6, if we reach a

1 certain threshold of either recovery of
2 settlement of the claims against Pepper, we, the
3 Trustee, can bind Royal to it, so that Royal's
4 claims are settled at the same time. If we
5 don't, it doesn't mean we can't litigate with
6 Pepper, and achieve whatever recovery we can
7 achieve.

8 It doesn't mean we can't settle. We
9 can still settle.

10 We just couldn't settle by giving up
11 Royal's claim. That's all that really amounts
12 to.

13 Paragraph 8, same thing. We can
14 object to admin claims in the Chapter 11, and
15 have those allowed or disallowed as the Court
16 sees fit, or we can settle them.

17 And what Paragraph 8 says simply is
18 if we settle them for a certain amount or less,
19 Royal will give up its claim. If Royal doesn't
20 give up its claim, we have the right to object to
21 the claim as well as any other claim. Nothing is
22 given up there.

23 So I would submit that these are --
24 it is important for these things to not be on the

1 record at the same time. They're not as
2 important as our adversaries would make them out
3 to be.

4 By the way, Your Honor, I am -- and
5 we're happy to file a motion tomorrow morning.
6 I'm advised by my local counsel that under Rule
7 9013, we can move orally in Court for permission
8 to file a document under seal.

9 THE COURT: You may be able to, but
10 I don't --

11 MR. McMICHAEL: That's fine.

12 THE COURT: Oral motions are very
13 hard for people to read on the record.

14 So file a motion, and I will deal
15 with the motion.

16 But I -- you know, it's one thing to
17 have a signed agreement with good litigation
18 strategy protection, but I don't think that the
19 same applies to the Court entering orders.

20 MR. McMICHAEL: Very well.

21 THE COURT: Let me ask you a
22 question, counsel.

23 MR. McMICHAEL: Yes, sir.

24 THE COURT: The basis for your

1 expedited motion was that this was the last
2 omnibus hearing before the expiration of the
3 two-year statute of limitations. But as I sit
4 here and listen to what I've been told, so what?

5 I mean, I didn't hear that there
6 were cases that couldn't be filed because the
7 two-year statute of limitations was about to
8 expire, nor have I heard anything today that
9 tells me that.

10 MR. McMICHAEL: Your Honor, the
11 Trustee wasn't really asked that question. And I
12 didn't address it in my proffer, not thinking it
13 was an issue.

14 But the answer is this: The Trustee
15 has a broad range of claims that it believes
16 should be brought against many people. It has --
17 the Trustee has some money in the estate, but not
18 nearly enough to litigate those claims.

19 THE COURT: But not enough to
20 litigate them, but certainly to bring them?

21 MR. McMICHAEL: Yes.

22 THE COURT: I mean, the concern that
23 I have, I'm going to be very frank with you, is I
24 ruled on the delegation issue. I'm feeling a

1 little uncomfortable about it, I must tell you.

2 And I'm not sure that -- you know,
3 sometimes you've got to be careful what you wish
4 for.

5 MR. McMICHAEL: Mm-hmm.

6 THE COURT: If I'm wrong, and if
7 you're wrong, you're going to spend the next year
8 fighting the delegation battle, rather than
9 dealing with the rest of the case.

10 MR. McMICHAEL: Right. We can --

11 THE COURT: I am --

12 MR. McMICHAEL: I'm sorry.

13 THE COURT: I'm wondering if you
14 guys want to think about whether you want to talk
15 amongst yourselves. I understand everybody's all
16 excited behind you, but --

17 MR. McMICHAEL: That happens.

18 THE COURT: I understand. But think
19 about whether maybe you want to try to, and maybe
20 Royal ought to, too, because they don't want to
21 fight this battle and find out a year from now
22 that I was wrong, and you were wrong to ask me,
23 to give me the opportunity to be wrong.

24 Because that's just another waste of

1 everybody's time and effort. And maybe you ought
2 to think about that, because I have no reason to
3 disbelieve that they're going to ask for a stay.

4 They're probably not going to get it
5 from me, but they may well get it from someone
6 else in this building. And whether you want to
7 fight that battle, and whether you want to just
8 try to accommodate what their concerns are.

9 And I'm particularly concerned about
10 the potential types of disinterested issues that
11 you end up with, and the analogy of the 327(e).

12 And the disinterested standard is
13 one. I mean, I'm going to review this any way.

14 I'm not going to decide this today.
15 But whether you really want to just put this on
16 for perhaps the next time I'm here, and consider
17 whether you want to try to craft some, perhaps
18 insignificant in the real world, modifications in
19 the agreement, but ones that might accommodate
20 and deal with those particular issues.

21 MR. McMICHAEL: I'll do it.

22 MR. ASTIN: Your Honor, before you
23 rule --

24 THE COURT: I'm not going to rule.

1 MR. ASTIN: Just a moment with
2 Mr. McMichael?

3 MR. McMICHAEL: He wants to make
4 sure I don't say anything really stupid.

5 THE COURT: He wants to tell you
6 what they've been negotiating while you've been
7 talking.

8 (Following a discussion held off the
9 record:)

10 MR. McMICHAEL: No. Your Honor's,
11 suggestion that we think about this is exactly
12 the right suggestion.

13 The good news is we already did
14 that, and we did it while other things were
15 happening in the courtroom. And we can solve the
16 problem right here.

17 The only case as to which there is a
18 current issue concerning delegating to Royal the
19 ability to bring on behalf of the estate is CDI,
20 DDI, Mr. Kortanek's client. The Trustee will
21 simply bring that case.

22 It won't be an issue. The reason
23 that we were doing it this way was because we
24 felt since we had tried to settle the case, and

1 the Court has overruled us on that, and we accept
2 the Court's ruling. And that's the basis for
3 which we now go forward.

4 That is our foundation. We thought
5 that under those circumstances, it might be less
6 awkward for Royal to do it, but it's not really a
7 significant matter. And we're happy to do it.

8 So there will be no other
9 delegation, unless the Trustee decides not to
10 bring a claim, or Royal wants to bring it. And
11 the Court can take that up when, and if, it
12 happens.

13 THE COURT: But that's what I
14 thought it was, but it's not. Apparently,
15 Paragraph 2 is different than Paragraph 7.

16 MR. McMICHAEL: Well, Paragraph 2
17 isn't going to happen unless the Court agrees to
18 it.

19 THE COURT: But what I'm
20 suggesting -- it's late. We are all tired.

21 What I'm suggesting is take a look
22 and see whether you can make everybody happy and
23 accomplish what you want. And take a few days,
24 if necessary, talk to the other side, look at

1 this whole new world.

2 You guys are sitting on the same
3 side of the table. Maybe you can sit on the same
4 side of the table with them.

5 I will rule if I have to. What I'd
6 like you to do is submit to me a black lined with
7 whatever you decide you want to do that modifies
8 the term sheet that's there. I think in spite of
9 the fact that I think everybody's acting in good
10 faith, your agreement says the term sheet's got
11 to be signed. I think it should be signed.

12 MR. McMICHAEL: The agreement?

13 THE COURT: The modifications don't
14 have to be in writing. I'd feel better if I'm
15 approving something that at least both sides have
16 signed off on.

17 Take a few days. I'm going to take
18 this under advisement. I'm going to await a
19 black lined from you with whatever amendments you
20 want, and then I will rule if it's necessary.

21 If you resolve the issues, or if you
22 think you've accommodated things, just black line
23 it. I'll look at them, and I'll give you my
24 ruling.

1 I will tell you that I'm not
2 troubled by the 510(c) issue. I think that I'm
3 satisfied with the economics of the transaction.

4 I'm prepared to approve it on the
5 basis that it does not, or it reaches at least
6 the lowest -- what's the exact words? I forget.

7 I don't want to misstate this. The
8 lowest end of the spectrum of reasonableness, I
9 think you've satisfied me on that. It's these
10 other issues that are raised, and that raise real
11 issues.

12 Now, I think I'm right on the
13 delegation issue, but you know, I've been
14 reversed before. I know that may be shocking to
15 you.

16 But I don't want to put you through
17 another year, a year and a half of unnecessary
18 litigation if a couple of corrective points
19 that -- and I'm not trying to interject myself
20 into the Royal litigation. I mean, if you can't
21 resolve it, if there's no change to the
22 agreement, just submit a signed agreement, and I
23 will rule.

24 Okay.

1 MR. McMICHAEL: Your Honor, that's
2 fine. And we will be guided by what the Court
3 wants, and we'll do that.

4 I have two observations, though,
5 that -- just so I am accurately communicating
6 with the Court on these subjects.

7 The first is the statute of
8 limitations is not an unimportant date for us,
9 because it effects Mr. Stanziale's judgment as
10 to --

11 THE COURT: So when is it? What day
12 is it?

13 MR. McMICHAEL: It's November 3rd.

14 THE COURT: Oh, that's light years
15 away.

16 MR. McMICHAEL: It's next week.

17 THE COURT: Well, is that before or
18 after the parade in Boston?

19 MR. McMICHAEL: It will be after the
20 parade in Boston.

21 THE COURT: You can skip the game
22 and do it tonight. I don't really care.

23 Get me something.

24 MR. McMICHAEL: We will. We will.

1 THE COURT: You will have a ruling.

2 You get me materials, you'll have a ruling.

3 What's the 3rd?

4 MR. McMICHAEL: The 3rd is next
5 Wednesday.

6 THE COURT: Okay.

7 MR. McMICHAEL: Okay. We will.

8 THE COURT: I'm here all day
9 tomorrow if you want to submit something
10 tomorrow.

11 MR. McMICHAEL: We will.

12 THE COURT: Fine.

13 MR. McMICHAEL: We will.

14 My second question is -- I think
15 Your Honor has answered it -- we don't need to
16 have another hearing. We need to submit --

17 THE COURT: Not unless you think,
18 after due consideration, that you need another
19 hearing.

20 MR. McMICHAEL: Okay.

21 THE COURT: You know, the
22 probability of you getting another hearing
23 between now and the 3rd is low. If you think
24 there's a need for another hearing, then you will

1 tell me.

2 MR. McMICHAEL: We don't think
3 there's need for another hearing. In fact, we
4 prefer there not to be one for wanting to get
5 this resolved before the 3rd for obvious reasons.

6 So we know we have this deal that
7 will -- in place before we dive head first into a
8 large pool of litigation.

9 THE COURT: Fine.

10 MR. McMICHAEL: That is all right.
11 I think that's all we have today on this issue.

12 THE COURT: That takes care of the
13 matter. We took -- the small matter, we took out
14 of order.

15 You gentlemen are excused if you
16 want to. We have several other matters. Don't
17 run away.

18 MR. STANZIALE: May I make it clear
19 to the Court that, as Trustee, I am going to
20 pursue the action against CDI, DDI. I'm not
21 going to delegate that right to Royal.

22 Royal understands that, and Royal
23 agrees with that.

24 THE COURT: Well, put it in the

1 agreement.

2 MR. STANZIALE: Okay. I just wanted
3 the Court to understand.

4 THE COURT: Fine. I appreciate
5 that, and I understand that.

6 All right. I'm going to exercise my
7 extensive powers and defer -- there are no
8 objections, is that true, to the fees anymore?
9 Although there was a continuance to give Royal an
10 opportunity to get further information.

11 MR. ASTIN: That's correct, Your
12 Honor. Three --

13 THE COURT: Do you have orders for
14 me?

15 MR. ASTIN: I have orders.

16 THE COURT: Does anybody want to be
17 heard on those fee applications in opposition to
18 them? Fine.

19 Give me your orders.

20 MR. WOLFSON: Your Honor, we
21 resolved the fee application and have agreed just
22 to a 20-percent hold back. And on that basis --

23 MR. ASTIN: Your Honor, I have 10
24 seconds on what we've agreed to.

1 THE COURT: Go ahead.

2 MR. ASTIN: We have all made
3 reductions by agreement with the U.S. Trustee or
4 otherwise. These orders will all reflect that.

5 We've agreed that we go with a
6 20-percent hold back on this application.

7 THE COURT: Is that in the order,
8 too?

9 MR. ASTIN: That's in the order.
10 Then we're going to file at a hundred percent
11 several months.

12 THE COURT: All right.

13 MR. ASTIN: We're going to also put
14 another motion on, so that going forward
15 beginning about November, we'll start going with
16 an 80-20 hold back, if Your Honor signed that
17 order.

18 That's all I have.

19 THE COURT: Very well. Okay.

20 So five is under advisement.

21 Just put them over there with the
22 fees. We'll deal with them tomorrow.

23 The motion to prove the settlement,
24 MBIA and Wells Fargo.

1 MR. ASTIN: There are no objections,
2 Your Honor.

3 MS. AUERBACH: We have a slightly
4 revised order.

5 THE COURT: Give me the order. I'll
6 take care of it tomorrow.

7 What's that?

8 MR. ASTIN: Your Honor, we have the
9 motion to quash, which Ms. Auerbach is handling,
10 which is not resolved.

11 THE COURT: Okay. Let me just put
12 these things aside.

13 MR. WINTER: Your Honor, good
14 evening. Chris Winter with Duane Morris.

15 Your Honor, I'm here for McGladrey &
16 Pullen and RSM McGladrey, Inc., and I'd like to
17 introduce the Court to Veronica Rendon of Thelen,
18 Reid & Priest.

19 We have filed papers for her
20 admission pro hac vice. I'd like to supplement
21 that now with an oral motion.

22 THE COURT: Go ahead. Welcome,
23 Ms. Rendon.

24 MS. RENDON: Thank you, Your Honor.

1 And I'll try to go as quickly as I can in light
2 of the hour that we're at.

3 THE COURT: We've got an hour and 18
4 minutes.

5 MS. RENDON: Okay.

6 THE COURT: An hour and 38 minutes.
7 Security people might not think so, though.

8 MS. RENDON: That's fine.

9 MR. WOLFSON: Do you have tickets to
10 game five or not?

11 THE COURT: Actually, I have tickets
12 to game six, and I'm prepared to -- they're
13 available for a small premium now.

14 MS. RENDON: I'm guessing this is
15 not the right time to say I'm from New York, and
16 I'm a Yankees' fan. So I won't.

17 THE COURT: We all have our crosses.
18 I've been carrying one around for 60 years.

19 MS. RENDON: Good luck. Actually
20 I'm rooting for the Sox.

21 I'm here on behalf of McGladrey &
22 Pullen and RSM McGladrey's motion, emergency
23 motion to quash a subpoena that was served by
24 Royal on the bankruptcy Trustee, in which Royal

1 is seeking documents.

2 I'm just going to call them
3 McGladrey, and have that term cover both
4 McGladrey & Pullen, and RSM McGladrey, Inc. just
5 for the Court's convenience.

6 But we're here to quash the subpoena
7 that Royal served on the Bankruptcy Trustee in
8 which Royal is seeking the documents that
9 McGladrey made available to its Trustee earlier
10 this year.

11 And the basis for our objection
12 is -- there are a number of bases for our
13 objection. The first is that the subpoena was
14 issued in a procedurally improper manner.

15 It was issued with too short notice.
16 There was less than 48 hours' notice given for
17 the subpoena.

18 THE COURT: All right. So let's --
19 if I was prepared to deny it on that, they'd
20 issue a new one. Let's not spend a lot of time.

21 MS. RENDON: It was not done on
22 notice. But most importantly, Royal does not
23 have standing to have issued the subpoenas.

24 The basis for the issuance,

1 according to Royal's paper and the Trustee's
2 submission, is the settlement that the Court is
3 considering today. Obviously, that settlement
4 was not in place when the subpoena was issued,
5 and it's still not in place.

6 So to the extent that the mechanism
7 from which Royal is standing to have issued the
8 subpoena, Royal doesn't have standing to have
9 issued that subpoena.

10 Secondly, the subpoena violates a
11 confidentiality agreement that McGladrey entered
12 into with the Trustee. And I'll give you some
13 additional factual background on that.

14 But let me just outline quickly
15 that -- all the three bases for our objection.
16 And then our most substantive objection, going
17 past procedural issues, I think dovetails very
18 much with the Court's express concerns or some
19 concerns that the Court has about delegation to
20 Royal.

21 I think it's clear, and again, I'll
22 give you some factual background to support the
23 assertion I'm about to make, that the subpoena
24 issued by Royal is really an attempt to obtain

1 improper pre-claim discovery against McGladrey,
2 relating much more to a civil lawsuit that Royal
3 is contemplating against McGladrey, having
4 nothing to do with any type of action that the
5 estate would like to bring against McGladrey.

6 And let me explain that a little bit
7 further by giving you a factual background here
8 about the circumstances surrounding the issuance
9 of the subpoena.

10 Back in January of 2004, the Trustee
11 approached McGladrey asking for our documents.
12 McGladrey had acted as one of the accountants and
13 auditors for Student Finance Corporation for a
14 number of years.

15 Given the Trustee's broad 2004
16 powers --

17 THE COURT: I'm sorry. I was trying
18 to ask parties over there to quiet down, so that
19 I could hear you better.

20 MS. RENDON: I have enough children,
21 I'm able to tune that out.

22 But thank you.

23 THE COURT: But my children are
24 grown up. I'm not as used to it as you, perhaps.

1 MS. RENDON: Okay. Given the
2 Trustee's broad 2004 powers and understanding
3 legitimacy of the Trustee's request to see our
4 documents, we were agreeable back in January 2004
5 to providing our documents to the Trustee. We
6 only placed one condition upon providing our
7 documents to the Trustee, and that was that we
8 wanted to protect against third parties being
9 able to go directly to the Trustee to seek our
10 documents, instead of those same third parties
11 coming to McGladrey & Pullen to seek those
12 documents.

13 The reason why we had that type of
14 concern back in January of 2004 is we were aware
15 at the time of the number of civil litigations
16 that were pending that involved Student Finance
17 Corp., including the Royal and MBIA litigation
18 that was pending in which Your Honor well knows
19 at this point involves big numbers, over \$500
20 million.

21 And because we were concerned that
22 Royal or MBIA might try to circumvent coming to
23 McGladrey to seek our documents and may go right
24 to the Trustee. We asked the Trustee to enter

1 into a confidentiality agreement with McGladrey,
2 in which we would protect against and ensure that
3 the Trustee would provide McGladrey with notice,
4 and an opportunity to intervene and object if a
5 third party were, in fact, to come to the Trustee
6 and seek our documents from the Trustee as
7 compared to coming to McGladrey directly.

8 We explained our concerns to the
9 Trustee, and back in February, on February 6th,
10 2004, the Trustee entered into a confidentiality
11 agreement with McGladrey to protect against
12 third-party access to our documents without us
13 having notice and an opportunity to intervene.

14 And Your Honor has a copy of that
15 confidentiality agreement. It was attached as
16 Exhibit 2 to the affidavit of Richard Swanson,
17 which was submitted in support of our motion to
18 quash.

19 The clear purpose of the agreement
20 was to provide McGladrey with notice and an
21 opportunity to respond to any third-party request
22 for our documents. And what Your Honor will see,
23 if you review that agreement, is that if, in
24 fact, a third party made a formal request for our

1 documents through notice motion or a subpoena to
2 the Trustee, the Trustee agreed to provide
3 McGladrey with notice of that subpoena and an
4 opportunity to object, to intervene and object.

5 THE COURT: Which is why you're here
6 today.

7 MS. RENDON: That's right.

8 If, on the other hand, a third party
9 came to the Trustee on an informal a verbal
10 basis, and requested our documents, the Trustee
11 agreed to provide McGladrey with notice of that
12 informal request, and agree that if McGladrey
13 requested that the Trustee go back to a third
14 party and ask that that request for documents be
15 made formal and be put in a formal written
16 notice, so that, again, McGladrey would have the
17 opportunity to intervene and object.

18 In entering into the confidentiality
19 agreement, the Trustee argued at this time that
20 there were too many limits being placed on
21 counsel's ability to utilize the McGladrey
22 documents, either in deposition or in Court
23 submissions.

24 So we added a paragraph into the

1 agreement confirming the Trustee counsel's right
2 to use our documents for those types of purposes.
3 And it's that paragraph that you'll see cited in
4 Royal's and the Trustee's opposition to our
5 motion to quash.

6 However, the manner in which they're
7 citing that paragraph is completely out of
8 context. And tellingly, the way that they're
9 citing that paragraph, it leaves out the last
10 sentence of that paragraph, which again --

11 THE COURT: Which paragraph is it?

12 MS. RENDON: It is the second, Your
13 Honor. It's the last large paragraph on the
14 second page.

15 It should be -- it's the second --
16 excuse me, the second substantive paragraph on
17 the second page of the letter agreement starting,
18 It should be noted.

19 THE COURT: It should be noted.

20 MS. RENDON: There it says that it
21 should be noted that in making this proposal, we
22 understand that the Trustee wishes to use the RSM
23 documents for the benefit of the estate without
24 limitation, and advanced notice is not requested.

1 By that I read for such use, thus,
2 we do not propose limiting the Trustee's right by
3 using the RSM documents as documents -- as
4 attachments to Court submissions or for
5 disclosure to the estate. Retained professionals
6 agree to be bound by this letter or any other
7 purpose that the Trustee determines would benefit
8 the interest to the estate.

9 And counsel for the Trustee and
10 Royal highlights that last clause of the
11 sentence.

12 However, in citing this paragraph to
13 Your Honor, they leave out the last sentence,
14 which really articulates the purpose that we
15 entered into the confidentiality agreement. And
16 that sentence says, All we are seeking is
17 protection against disclosure to third parties in
18 the circumstances outlined in the third and
19 fourth paragraph above without our awareness and
20 our opportunity to respond.

21 Clearly, the intent of the agreement
22 was to provide McGladrey with a notice and an
23 opportunity to object and respond to any
24 third-party request for our documents that are in

1 the Trustee's possession.

2 Believing that we would have that
3 opportunity, on February 10th, 2004, McGladrey
4 made the documents available to the Trustee. And
5 we did so, again, a second time on October 1st of
6 2004, after the Trustee agreed to be bound again
7 by our confidentiality agreement when they --
8 when they wished to review McGladrey's documents
9 for a second time.

10 On September -- on September 15th,
11 2004, the Trustee notified us that Royal had
12 verbally requested access to our documents that
13 were in the Trustee's possession. Knowing that
14 Royal had just had a motion for summary judgment
15 or motions for summary judgment granted against
16 it in the MBIA civil litigation, and knowing that
17 that may well result in an excess of a \$500
18 million civil liability for Royal, and not
19 understanding any legitimate purpose for Royal to
20 be seeking our documents, we told the Trustee
21 that we objected to Royal's request.

22 And pursuant to our agreement with
23 the Trustee, we asked the Trustee to go back to
24 Royal and have Royal make a formal written

1 request for our documents. The express purpose
2 being so that we could intervene and object.

3 On September 22nd, pursuant to our
4 request, Ms. Auerbach, counsel for the Trustee
5 wrote to Royal, and made that request, that Royal
6 put its request for our documents into -- make
7 it -- put it into a formal written request.

8 At that time, Ms. Auerbach clearly
9 understood that McGladrey planned on objecting to
10 Royal's request for our documents. We did not
11 hear anything further after September 22nd until
12 October 13th.

13 On that day at 6:40 p.m. in the
14 evening, we received a subpoena from Royal. I
15 should say it's the Royal subpoena that was
16 addressed to the Trustee, and the Trustee
17 provided it to us at 6:40 p.m. on the night of
18 October 13th.

19 It requested production of
20 McGladrey' documents in the Trustee's possession.
21 It requested that the production of those
22 documents occur at 10 o'clock a.m. that -- the
23 following Friday, October 15th, less than 48
24 hours later.

1 Clearly, the manner in which the
2 subpoena was issued was designed to craft
3 McGladrey's ability to intervene and object to
4 the subpoena, notwithstanding the existing
5 confidentiality agreement, and notwithstanding
6 the fact that they were well aware of the
7 existence of the confidentiality agreement.

8 It was explained to us much earlier
9 that Ms. Auerbach -- Royal had been provided with
10 our confidentiality agreement and that they
11 understood the terms.

12 Still being at my desk at 6:40 at
13 night, because that's just life in New York, I
14 responded to Ms. Auerbach's Email, and the
15 subpoena from Royal. And I notified Ms. Auerbach
16 by Email that we plan on objecting to the Royal
17 subpoena, because it was procedurally improper,
18 because Royal lacks standing to issue the
19 subpoena, and because we believed it was an
20 improper attempt to obtain pre-claimed discovery
21 for a civil litigation that Royal may wish to
22 pursue against McGladrey some day.

23 THE COURT: Is there -- there is no
24 litigation pending between the estate and

1 McGladrey, is there?

2 MS. RENDON: No. In fact, I'll get
3 to that.

4 It's our understanding that the
5 estate, at least the estate represented by
6 Ms. Auerbach's firm, has no, absolutely no
7 intention of bringing a lawsuit against
8 McGladrey. And I think I understand if the
9 estate were to attempt to do that, they would
10 face insuperable in pari delicto questions in
11 trying to make that type of claim.

12 But let me get to that in just a
13 moment. If that's in pari delicto, when I wrote
14 back to Ms. Auerbach, the note of October 19th, I
15 asked her in my Email to please confirm
16 consistent with the confidentiality agreement
17 that the Trustee would not produce our documents
18 to Royal until we had an opportunity to intervene
19 and object to Royal's request for our documents.

20 The next morning, October 14th, less
21 than one day after, with less than one day to go
22 before production was supposed to occur,
23 Ms. Auerbach Emailed me back to say they planned
24 on complying with the subpoena.

1 I called Ms. Auerbach later in the
2 day to inquire why it was that she was planning
3 on complying when I believed that was a clear
4 breach of the confidentiality agreement that had
5 been entered into between McGladrey and the
6 Trustee. And I also -- and Ms. Auerbach's answer
7 was because she believed it would be a benefit
8 of -- a benefit to the estate to produce the
9 documents to Royal.

10 I asked Ms. Auerbach to explain how
11 the would be of benefit to the estate, and she
12 said that she couldn't say anything further
13 except that it would be consistent with the
14 Trustee's settlement with Royal.

15 When I told her I was not aware of
16 any kind of settlement with Royal, could she
17 explain that to me, and explain the terms of the
18 settlement to me, she said -- she said that she
19 couldn't tell me anything further, that it was --
20 it should be on the public docket, and that she
21 had probably already told me too much.

22 We believe Royal's subpoena is
23 simply an attempt to obtain improper pre-claim
24 discovery for a civil lawsuit that has absolutely

1 no bearing on the interest of the estate.

2 Let me tell you initially why we
3 think that's clear. On October 14th, having
4 received the Royal subpoena, my partner Richard
5 Swanson contacted Mr. Gilbert and counsel for
6 Royal to talk about Royal's request for our
7 documents.

8 Mr. Swanson, in the course of that
9 conversation, asked Mr. Gilbert what he believed
10 the benefit to the estate would be for Royal to
11 obtain our documents.

12 Mr. Gilbert refused to respond to
13 that inquiry. My partner, Mr. Swanson, also
14 asked Mr. Gilbert whether Mr. Gilbert would agree
15 to accept McGladrey's documents pursuant to a
16 protective order, pursuant to which an ethical
17 wall would be erected between people at Royal who
18 are interested in pursuing estate claims, and
19 people at Royal who would be interested in
20 pursuing civil litigation claims against
21 McGladrey.

22 Tellingly, Mr. Gilbert refused that
23 request, as reasonable as it was. It's clear to
24 us, based upon our conversations with

1 Ms. Auerbach and Mr. Gilbert, that Royal is
2 trying to use the settlement or the proposed
3 settlement with the Trustee to obtain our
4 documents.

5 But even were a settlement to be in
6 place, there's no legitimate reason for Royal to
7 be obtaining our documents. In its opposition
8 papers to our motion to quash, Royal allowed the
9 necessity of exploring claims against McGladrey.
10 Yet, the Trustee has had our documents for over
11 eight months for exactly that purpose.

12 And the Trustee has clearly
13 indicated to us that, and said that it has
14 absolutely no intention of seeking any claims
15 against McGladrey. Those statements were made by
16 Mr. Derrick Dyer in a letter to me in connection
17 with our second production of documents to the
18 Trustee.

19 And in that letter, Mr. Dyer
20 clarified that the reason why the Trustee wanted
21 to review our documents was not to investigate
22 claims against McGladrey, but rather to
23 investigate claims that the Trustee was likely
24 going to make against Pepper Hamilton.

1 Following that, Ms. Auerbach wrote
2 back and softened Mr. Dyer's letter. But in a
3 conversation that I had with Ms. Auerbach, she
4 clearly stated to me that there was no current
5 intention of bringing a claim against McGladrey,
6 and likely never would be. She simply could not
7 make that official, because it would be
8 inappropriate, given the procedural stance of the
9 case.

10 The terms of the settlement and
11 everything we heard today indicates that
12 McGladrey is not being considered for a lawsuit,
13 and with good reason. The estate would clearly
14 face insuperable in pari delicto -- in pari
15 delicto problems if it were to attempt to claim
16 against McGladrey.

17 As Mr. Stanziale testified today,
18 their allegations are fraud all over the place,
19 and it's a fraud that was committed by
20 Mr. Yao.

21 And if that's the case, the estate
22 cannot sue McGladrey for not having caught that
23 fraud without facing an insuperable in pari
24 delicto case.

1 THE COURT: I don't have to decide
2 that today, do I?

3 MS. RENDON: I think you're right.

4 THE COURT: I mean, the estate's got
5 the documents. You have no problem -- I gather
6 you knew that there was a possibility that they
7 might sue you and use those documents.

8 MS. RENDON: That's correct, Your
9 Honor.

10 THE COURT: I mean, you took that
11 risk.

12 MS. RENDON: Yes.

13 THE COURT: Which what you are
14 saying is you didn't take the risk that Royal,
15 acting on their own behalf, would have access to
16 those documents?

17 MS. RENDON: I think --

18 THE COURT: By way of the Trustee or
19 anybody else that might choose to sue you?

20 MS. RENDON: That's exactly right,
21 Your Honor. In fact, when we entered into the
22 confidentiality agreement, we were specifically
23 trying to guard against exactly that risk by --
24 and that is why we entered into the

1 confidentiality agreement, because we were not
2 willing to sign on for that risk.

3 We were certainly willing to
4 cooperate with counsel for the Trustee, though,
5 and Your Honor, it just appears so clear to us,
6 given Mr. Gilbert's unwillingness to enter into
7 the protective order, and given a complete
8 failure even as of right now to articulate a real
9 need for Royal to have our documents when the
10 Trustee has had them for eight months, and had
11 the ability to analyze them for our documents to
12 be made available to Royal.

13 And it's clear that Royal's 2004, as
14 broad as it is, cannot -- does have its limits.
15 It cannot be used to circumvent the requirements
16 of Federal Rules of Civil Procedure.

17 Rule 9016 of the Bankruptcy
18 Procedure Rules incorporates Rule 45, which in
19 turn is governed by rule, Federal Rules of Civil
20 Procedure Rule 26.

21 And under those rules, you cannot
22 take pre-claim discovery until after a claim is
23 filed. Those types of concerns were raised in
24 the In Re: Continental Forge case, in the In Re:

1 Enron case, in the In Re: Nyder versus Society
2 Bank case.

3 And in all of these cases, Royal's
4 2004 requests for documents were turned down
5 because the belief was that they were really
6 trying to obtain information for interests
7 unrelated to the estate, but interests to further
8 a private litigation. And that is clearly an
9 improper purpose of Rule 2004.

10 Each one of those cases I just cited
11 to Your Honor express the concern that Rule 2004
12 discovery cannot be used to circumvent the
13 safeguards of the Federal Laws of Civil
14 Procedure, and that is exactly what Royal is
15 attempting to do for all these reasons, because
16 Royal does not have standing to have issued the
17 subpoena, because it was improperly noticed,
18 because it wasn't done on a notice motion.

19 And most importantly, because the
20 subpoena is trying to be used to circumvent the
21 requirements of the Federal Rules of Civil
22 Procedure. We respectfully request that the
23 subpoena be quashed.

24 Thank you, Your Honor.

1 THE COURT: Thank you.

2 Royal.

3 MR. BICKS: Good evening, Your
4 Honor. John Bicks of Sonnenschein, Nath &
5 Rosenthal for Royal Indemnity.

6 Your Honor, obviously to hear the
7 presentation from McGladrey, you might lose sight
8 of a couple of the basic touchstones of the issue
9 that's really before you.

10 We are talking about documents that
11 are indisputably not privileged documents that
12 have already been produced to the Trustee.

13 THE COURT: What right do you have
14 to them?

15 MR. BICKS: Your Honor, you heard a
16 lot of testimony today from Mr. Stanziale, a lot
17 of argument about Royal's willingness to step up,
18 put the money where its mouths is, and put almost
19 \$5 million of seed capital into this estate.

20 And the principal purpose of that
21 settlement from the estate's perspective is it
22 gives the estate the ability to investigate
23 claimants, and it certainly is clear why
24 McGladrey ought to be concerned that the estate

1 might very well want to assert not only claims --

2 THE COURT: But if this is an estate
3 claim, why does Royal have a right to these
4 documents?

5 MR. BICKS: I think, were we not
6 before you, Your Honor, this afternoon also on
7 the motion to approve the settlement, whereby
8 Royal was going to act in partnership with the
9 Trustee, to help the Trustee.

10 THE COURT: But even if that's the
11 case, this would be a Paragraph 7 action, if, in
12 fact, the Trustee determined not to bring the
13 action.

14 MR. BICKS: It could qualify if the
15 Trustee chose not to bring the action. That's
16 absolutely true.

17 THE COURT: So you haven't any right
18 at the moment to bring an action on behalf of the
19 Trustee, do you?

20 MR. BICKS: We don't have an
21 approved settlement. Your Honor has taken it
22 under advisement.

23 THE COURT: Even if I did, does the
24 approved settlement give you automatic right to

1 bring action?

2 MR. BICKS: Only after the Trustee
3 takes a pass.

4 THE COURT: And the Trustee hasn't
5 taken a pass.

6 MR. BICKS: That is correct. I
7 think it's also important that the record be
8 accurate, what the Trustee has done, and what the
9 Trustee has said and not said about what its
10 willingness is to --

11 THE COURT: Well, I would assume --
12 I mean, whether the Trustee told them they didn't
13 think it was going to sue them at all, I don't
14 really care what at this point.

15 If you had a settlement and if the
16 provisions were triggered that you could bring
17 the action, maybe you might have the right to the
18 documents from the Trustee. But we're not there
19 now, are we?

20 MR. BICKS: We are not there in the
21 sense that two things have not happened, Your
22 Honor.

23 One, Your Honor has not approved the
24 settlement.

1 And, two, the Trustee has not
2 reviewed and taken a pass.

3 The other issue that you have to
4 look at, this whole issue, I think in fairness
5 under the real life time line that we're
6 currently presented with, and that is that next
7 week certain statutes of limitation will arise
8 and will bar or may bar.

9 THE COURT: Hey, I didn't create
10 that problem, gentlemen and ladies. That date
11 was set two years ago, and you just got around to
12 settling your case.

13 You may have to bring your own
14 lawsuits.

15 MR. BICKS: Understood. I
16 understand Your Honor.

17 That may very well happen.

18 THE COURT: That may be. But what
19 you're telling me is that part of what you bought
20 is the right to get information from the Trustee
21 even before the settlement came before me.

22 MR. WOLFSON: Your Honor --

23 THE COURT: That I find a little
24 offensive, frankly.

1 MR. WOLFSON: First -- first couple
2 of points.

3 Under 2004, I think that we, as a
4 creditor of the estate, have the absolute right
5 to try to review any and all documents that
6 impact the action, conduct, property of this
7 estate. To the extent these documents impact the
8 act, conduct and property of the estate, I don't
9 understand counsel's point of view that we
10 have -- just because we might have some other
11 potential claims which we have not brought
12 against them, the fact that I might have another
13 potential individual claim doesn't mean that we
14 can't exercise our rights under 2004, and look at
15 the act, conduct, property of this estate.

16 That's point number one.

17 Point number two is we are trying to
18 cooperate with the Trustee. We are trying to
19 work with the Trustee and understand where the
20 Trustee is coming out.

21 On the McGladrey issue, they have
22 not definitively said to us that they are or are
23 not going to bring the action, although clearly
24 they're leaning on not bringing it. A good

1 portion of why they're leaning that way is
2 because of what we perceived may be a
3 misunderstanding of the in pari delicto defense
4 where, while it may be applicable under a 541
5 action, it is not applicable under a Section 544
6 action.

7 And we are working diligently with
8 the estate in order to enable the Trustee to
9 better understand our perspective. This may be
10 an important asset of the estate for an estate
11 claim, not an individual creditor claim.

12 And to the extent it's an estate
13 claim, we just want to be able to have the
14 information.

15 THE COURT: When does the statute of
16 limitations run?

17 MR. WOLFSON: You have two -- my
18 understanding is you have two years to bring the
19 action from the commencement of the case.

20 THE COURT: So it ends --

21 MR. WOLFSON: November 3rd, it ends.
22 It ends next week.

23 So we have a couple of days.

24 THE COURT: So that's why you felt

1 you could issue a subpoena on 36 hours' notice?

2 MR. WOLFSON: We told them -- first,
3 we believe that this subpoena was issued.

4 THE COURT: Why wasn't the subpoena
5 issued on them?

6 MR. WOLFSON: Well, because --

7 THE COURT: Why do you need the
8 Trustee if you truly are doing a 2004?

9 MR. WOLFSON: Right.

10 THE COURT: And you want somebody's
11 documents.

12 MR. WOLFSON: Well, I can take a
13 2004 of a Trustee.

14 THE COURT: Yeah, I know you can.

15 MR. WOLFSON: That is what we're
16 trying to do.

17 THE COURT: Yeah, but the Trustee --
18 you're putting the Trustee in the position of the
19 soft confidentiality agreement being entered and
20 now you're basically prostituting him by making
21 him give up those documents because of the
22 settlement. The settlement isn't approved.

23 MR. WOLFSON: I understand.

24 THE COURT: And if you want me to

1 deny the settlement because you're doing an end
2 run around instead of going directly to the
3 source, you're very close to it.

4 MR. WOLFSON: No, we don't. We're
5 not basing our right to the documents on the
6 settlement. Either they're approved or not
7 approved.

8 What we understood from the Trustee
9 who has said to us -- we have been collaborating
10 and working with the Trustee to try and get into
11 a better -- a better arrangement, so that we're
12 working cooperatively instead of at odds. And we
13 have been sharing information.

14 We have been trying to share our
15 point of view. They've been sharing their point
16 of view.

17 Of all the lawsuits out there, this
18 is one -- this is one potential lawsuit that
19 we've been exploring with them. And what we
20 wanted to do is see what documents they're
21 looking at.

22 Now, yes, we understand there's a
23 confidentiality agreement. We read the
24 confidentiality agreement, and candidly, we

1 thought that that confidentiality agreement
2 absolutely permits the Trustee in the context of
3 this sort of a collaboration, with or without a
4 settlement agreement, given it has the right to
5 share this sort of a document with another
6 creditor of the estate in order to help the
7 Trustee determine what to do on that action.

8 We asked for it. And I believe my
9 understanding is that counsel for the Trustee
10 believes that that's the appropriate analysis of
11 that agreement, also.

12 But counsel for McGladrey objected,
13 and out of an abundance of caution, counsel for
14 the Trustee said, Look, we read this agreement.
15 We think we can give it to you.

16 We think McGladrey is making a big
17 fuss about it. We don't want to get sued by
18 McGladrey, because we're giving you documents
19 that we thought we could.

20 So would you give us a subpoena?
21 That's how that came about.

22 And, yes, we are faced with a time
23 line by which the Trustee needs to decide whether
24 to bring a lawsuit, and with or without this

1 agreement, and whether we're ever authorized to
2 sue McGladrey on behalf of the estate.

3 We'd like the opportunity to work as
4 closely as we can with the Trustee to try to
5 persuade them so that it is or is not proper.
6 And if they have information that we don't know,
7 we may be wrong. We may -- we may not be right
8 that there's a cause of action, but I do not
9 believe --

10 THE COURT: Let me ask McGladrey,
11 why if they subpoenaed you directly, why couldn't
12 they get this? This isn't privileged
13 information, is it?

14 MS. RENDON: Some of the documents,
15 I think, are arguably privileged.

16 THE COURT: Did you give them -- a
17 privilege log to the Trustee?

18 MS. RENDON: We did not. What we
19 did is we copied documents that the Trustee
20 requested, and those didn't necessarily -- were
21 not necessarily the privileged documents.

22 So I just -- we have a larger volume
23 of documents.

24 THE COURT: I'm not sure I

1 understand. You gave the Trustee privileged
2 documents or you didn't?

3 MS. RENDON: I don't believe we did.

4 THE COURT: Why couldn't they
5 subpoena those from you right now? If this was a
6 motion for me to authorize them to take a 2004
7 examination, why wouldn't I -- I mean, it's sort
8 of an obscure way of getting to the same point.

9 Why wouldn't they be entitled to
10 that under the usual scope of 2004(b)?

11 MS. RENDON: Your Honor, because I
12 believe there really is no other purpose for
13 Royal seeking our documents except to further a
14 civil lawsuit that they're contemplating on
15 behalf for their own personal reasons, having
16 nothing to do with the benefit of the estate.

17 They are -- there really is an in
18 pari delicto problem that applies to the estate.

19 THE COURT: There may be, and that's
20 an affirmative defense. And you can plead it at
21 the time.

22 MS. RENDON: But --

23 THE COURT: But if I take them at
24 their word that they're working with the Trustee,

1 why shouldn't they have the right to see these
2 documents? And maybe they can convince the
3 Trustee that he's wrong on his -- on your
4 analysis of in pari delicto. Maybe the Trustee,
5 maybe not the Trustee.

6 MS. RENDON: Your Honor, if that
7 were the case, and if that really were Royal's
8 motivation, I don't understand why Royal would
9 dis -- would not agree to enter into a protective
10 order with us wherein people that -- that at
11 Royal, people at Royal, the only people at Royal
12 who could look at our documents are those
13 interested in analyzing estate claims and not
14 those people who are interested in analyzing
15 civil lawsuits on Royal's personal behalf.

16 I think it is very telling that
17 Mr. Gilbert would not agree to enter into that
18 agreement. The real purpose underlying Royal's
19 interest in the McGladrey documents is for its
20 pursuit of a civil lawsuit that they simply could
21 not bring in good faith on behalf of the estate.

22 I don't think you can divorce out
23 the in pari delicto analysis.

24 THE COURT: Why shouldn't I enter an

1 order limiting that?

2 MR. WOLFSON: Because it's
3 impossible. People -- we don't have a big enough
4 time, and we're not Merrill Lynch. We don't
5 have, you know, a big enough time.

6 It's totally uneconomical for the
7 commitment. You'd be asking people who have no
8 familiarity of the issues to be looking at. What
9 we will agree with, though, Your Honor, we'll
10 agree to abide by the same confidentiality
11 agreement that the Trustee is.

12 And we're not looking to, you know,
13 open up the flood gates. If anyone else wants to
14 see it, let them go through the same exercises
15 there, whether it's 2004 --

16 THE COURT: I mean, what you're
17 really forcing here is them to bring a lawsuit,
18 and the Trustee to bring a lawsuit, and then sort
19 it out afterwards.

20 That's what you are facing by next
21 Wednesday if I deny -- if I quash the subpoena.

22 MS. RENDON: That's possible, Your
23 Honor. I will say this, Your Honor, in response
24 to what counsel just said, believing that they

1 don't have the resources when they're entering
2 into a \$5 million settlement, they're worried
3 about a \$500,000 liability.

4 It strings the bound of credibility,
5 and so I think it's very telling.

6 THE COURT: Given the number of
7 days, it may be not impractical to do that.

8 MS. RENDON: Well, Your Honor, I
9 will also say that it was back on September 15
10 that we were first notified that Royal had some
11 interest in our documents. We did not receive a
12 Royal 2004 notice proceedings motion.

13 At this time, we did not directly
14 receive a subpoena, and there was no reason why
15 Royal couldn't have issued it at that point.
16 Royal has put themselves in a procedural
17 quandary. And they're looking to abuse the
18 processes of this Court to try to get our
19 documents.

20 And, Your Honor, frankly, I believe
21 it's for an improper purpose. It's to benefit
22 their possible civil lawsuit against McGladrey.

23 They've already referenced us in
24 proceedings that they've submitted in the MBIA

1 lawsuit. They have already indicated in those
2 pleadings why they think there might be a basis
3 for a civil lawsuit against McGladrey.

4 And even if you look at Royal's
5 papers submitted in opposition to our motion to
6 quash, it speaks in terms of a private civil
7 lawsuit. It does not speak in terms of claims
8 brought on behalf of the estate.

9 It speaks in terms of reliance by
10 Royal as an investor on financial statements,
11 audited financial statements issued by the
12 accountant and the auditor, and not about
13 whether -- where the estate is.

14 The estate was not an investor in
15 Student Finance. It is Student Finance, and
16 that's why there's an in pari delicto problem.

17 I just disbelieve, Your Honor, that
18 the stated purposes of Royal's counsel are just
19 belied by the fact that there is no desire and an
20 unwillingness to enter into the protective order
21 that's very reasonable for McGladrey to have
22 asked for them to enter into.

23 MR. WOLFSON: Judge, these are not
24 privileged documents, and we're ultimately going

1 to get them any way. All we want to do is
2 interface with the Trustee, see whether or not we
3 can resolve this one remaining issue.

4 Maybe the Trustee is right, and they
5 have to -- after we look at documents, we agree
6 with the Trustee, and the Trustee doesn't bring a
7 lawsuit. We don't bring a lawsuit.

8 But we're going to get documents any
9 way. We're entitled to under the 2004 rule.

10 They're not privileged. It's only
11 confidential because McGladrey is trying to hide
12 them. It doesn't make any sense.

13 MS. RENDON: Your Honor, the offer
14 to enter into a similar confidentiality
15 agreement, well really serves no purpose. Royal
16 is the third party that we're trying to protect
17 ourselves from.

18 So Royal saying they would -- they
19 have a potential \$5 million liability, it's clear
20 that if they're facing a \$500 million liability,
21 that they're likely going to seek any possible
22 source to offset that liability, including
23 McGladrey.

24 And it's for that purpose they're

1 seeking their documents. And we would just
2 submit again that it's --

3 THE COURT: All right. I've heard
4 enough.

5 What do you have to say? A new
6 voice.

7 MS. AUERBACH: A couple points as
8 the person in the middle here. Sheryl Auerbach.

9 I don't regard this agreement as a
10 confidentiality agreement. I sent two letters
11 before it was signed to McGladrey saying, Please
12 don't call it a confidentiality agreement,
13 because it's not a confidentiality agreement.
14 And that's the very --

15 THE COURT: Well, whatever it's
16 called.

17 MS. AUERBACH: The reason -- very
18 reason I inserted the paragraph that Ms. Redon
19 read was because I wanted the Trustee to be able
20 to use the documents for this, for whatever
21 purpose he thought was proper to benefit the
22 estate.

23 I did give notice as asked for in
24 the first paragraph of the letter to Ms. Redon as

1 soon as Royal told me they wanted these
2 documents, which was several weeks before they
3 issued the subpoena. And it is true, and I'm
4 representing to the Court that Royal has been
5 urging the Trustee to reconsider and to bring the
6 suit against RSM McGladrey.

7 In fact, the second exhibit to the
8 response we filed is a letter that I sent to
9 Thelen Reid, counsel for RSM McGladrey, which
10 indicated we were still investigating the claim.

11 THE COURT: Thank you. All right.

12 On the limited issue that's before
13 me, because that is how I'm supposed to deal with
14 these things, although there may be other ways to
15 get the documents, I don't think the subpoena was
16 proper.

17 You might get what you wish for,
18 counsel. You may have two lawsuits next week.

19 But the subpoena was not issued with
20 appropriate time. I'm going to enter the order
21 quashing the subpoena.

22 That doesn't mean that I might not
23 grant a motion for 2004 at some point in time,
24 and I might not allow a subpoena in the

1 appropriate circumstances.

2 But based on the subpoena that's out
3 there now, the method it was served, and the
4 like, I'm granting the order quashing the
5 subpoena.

6 I'm not sure that's the most
7 practical thing you could have asked for, but
8 that's what you asked for. Looking at the letter
9 of the Federal Rules, and the Rules of Bankruptcy
10 Procedure, at this point in time, I think you're
11 correct that I don't have a 2004 motion before
12 me. And I'm going to order the quashing of the
13 subpoena.

14 The Trustee can do what the Trustee
15 feels is appropriate under the terms of the
16 agreement that they have.

17 And you'll have what remedies you
18 might have out there in the world if they violate
19 the agreements, and you have to sue them. I'm
20 not going to make a judgment on that right now.

21 But as far as a subpoena, and this
22 subpoena, it's quashed.

23 MS. RENDON: Thank you, Your Honor.

24 THE COURT: Anything else on the

1 agenda, folks?

2 MR. ASTIN: Nothing else, Your
3 Honor.

4 THE COURT: Very well. I will be
5 looking for either a statement, or an Email, or
6 something to my deputy telling me that you're
7 going to modify the term sheet, that you've
8 talked to people, you haven't talked to people.
9 Just let me know what you're going to do.

10 MR. ASTIN: We can Email it as an
11 attachment to His Honor?

12 THE COURT: You do it all the time,
13 don't you?

14 MR. ASTIN: I mean, this particular
15 item?

16 THE COURT: Yeah. You don't have to
17 file it.

18 First, we'll file it. I'll attach
19 it to an order. If you want to modify the
20 agreement.

21 MR. ASTIN: And on the motion -- and
22 on the motion to file under seal?

23 THE COURT: A motion to file, just
24 file the motion.

1 MR. ASTIN: All right.

2 THE COURT: Just file it in the
3 usual fashion. If you want to E-file the term
4 sheets, that's fine, too. Just let her know it
5 is there.

6 MR. ASTIN: I wasn't sure how to
7 handle the objection, that's fine, Your Honor.

8 THE COURT: Okay, either way.

9 MR. ASTIN: Mm-hmm.

10 THE COURT: Just get it to me. You
11 can use the old fashioned way, just have it
12 delivered.

13 MR. McMICHAEL: You'll have them
14 tomorrow.

15 THE COURT: I'll be here.

16 All right. Thank you all.

17 Please leave the building promptly,
18 because they'll have the search dogs looking for
19 you.

20 (Court was recessed at 7:08 p.m.)

21

22

23

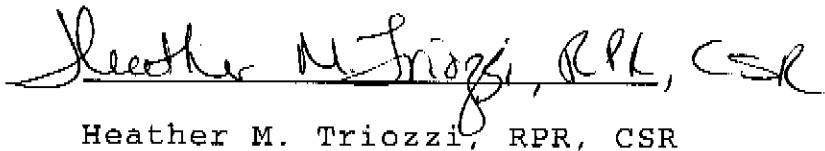
24

1 State of Delaware)
2 New Castle County)
3
4

5 CERTIFICATE OF REPORTER
6

7 I, Heather M. Triozzi, Registered
8 Professional Reporter, Certified Shorthand
9 Reporter, and Notary Public, do hereby certify
10 that the foregoing record, Pages 1 to 179
11 inclusive, is a true and accurate transcript of
12 my stenographic notes taken on October 27, 2004,
13 in the above-captioned matter.
14

15 IN WITNESS WHEREOF, I have hereunto
16 set my hand and seal this 28th day of October,
17 2004, at Wilmington.
18

19
20 
21 Heather M. Triozzi, RPR, CSR
22
23
24